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Jurisprudential history of judicial precedent in the English and American tradition

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Abstract: The present paper is based on a comparative analysis with the help of the jurisprudence and doctrine of stare decisis and of precedent in the common law systems, that attributing to judicial precedent. Previous decisions are suitable for the judge to pronounce at a time subsequent to a legal obligation, that consists and remains decided. The judge often distances himself from the precedent and is adapted to it. The doctrine of binding precedent in common law systems is a complex reality, which deeply implies the evolution and jurisprudential application of the rule in the English and North American systems. The preliminary process takes into consideration the precedent in common law countries and the rule of stare decisis is not confused with a practice that is recurrent and follows precedents. Justice is linked to the principle of equality as well as to the value of certainty of law, that is, predictable to decisions and to the Western legal tradition in cases decided

with similar way. The modus decidendi belongs to the civil law systems and is part of a historical-cultural plan of the civil law systems as a legal obligation intended to develop the argument under examination. Respect for the social demand, which feels the stages of evolution of each legal system is a need for certainty, which constitutes the stare decisis, that is, a formal instrument binding to a model of institutional response. The formalized constraint of acts of direct legislation pose to the courts a construction of a judicial practice always in evolution.

Keywords: stare decisis; common law systems; judicial precedent; modus decidendi; civil law systems; judicial practice.

The stare decisis in the American law system

Continuing to talk about stare decisis between civil law and common law as well as between American and English law is a classic topic but always evolving through the relative jurisprudence.

Stare decisis et non quieta movere as a traditional basis of common law attributes a binding value of rule of law to a precedent judged suitable to give rise to a legal obligation, which remains on this decided.

The judge does not react to what is already decided but is conformed with it. This is the tradition of the doctrine of binding

precedent, which characterizes the common law in a precise way. The reality implies in a historical-cultural and conditioned way the evolution of a jurisprudential application of the relative rule with relevant differences, which are recorded in the English and North American systems.

The judicial precedent is taken into consideration, as a typical characteristic for common law countries, that is, as a precise fundamental concept. The rule of stare decisis is not confused with the recurrent practice of precedents.

The canon of justice connected with the principle of equality and the pursuit of the value related to the certainty of law, is coherent, providing for the decisions of the Western legal tradition decided in a similar way. The modus decidendi is part of the civil law systems and the presence of a mandatory does not depart from the previous data, which is so precise to the common law family.

At a historical-cultural level it appears foreign to the civil law (Schlesinger, 1980),[1] referring to a legal obligation understood

1For example, in the Spanish system, the jurisprudence is noted in the civil code in the sources of law. Through the legal doctrine of the Tribunal Supremo, which means the consolidated jurisprudence of the supreme court, the completion of a legal system is attributed, which elaborates the jurisprudential principles to interpret and apply the law, custom, and general principles of law. In the Mexican system, the binding value for lower judges, through the chamber of the Tribunal superior de justicia federal, takes into consideration the decisions of the plenary session of the same court in contrast with other chambers. In the Argentine system, through Art. 303 of the Còdigo Procedimento Civil y Commercial, the Spanish rule is taken into consideration. In the French and German systems, especially the supreme court gathers in an extended manner the section that does not take into consideration the precedent. In the system of Bundesgerichtshof and in the Oberlandesgericht, the involvement of two sections is taken into consideration, namely Senat of

in a way to accompany the development of the argument under examination. In this way, the social demand, that feeling the stages of the evolution of each legal system, is respected. It is a certainty that pursues various modalities of different systems, as a rule, constituting a formal binding instrument, as a model of systems.

As a rule, the stare decisis constitutes a formal instrument of a binding nature to a legal model. It is, in other words, an institutional response. It is, therefore, anticipated that is a constraint, that formalizes acts of direct legislation in the courts, i.e. an institutional construction of judicial practice.

The affirmation of precedent as a declarative theory of common law

In the English legal system, judicial precedent appears as unwritten law, in the jurisprudential law with a set of principles and legal rules, which emerge from the decisions of judges and from acts of direct legislation.

According to the declarative theory, law is understood as an immutable corpus, based on the sense of reasoning (Bacon, 1625; Baker, 2000). It is a conception of a law that does not change human reason but manifests in an inevitable way the figure of the oracular judge, as a task of jus dicere, not jus dare

Bundesgerichtshof and of Grosse Strafsenate.

thus creating a law to be discovered. This approach lives with the idea of a law understood, as existing custom in a fixed and immutable way (Lewis, 1930; Allen, 1964; Cross, Harris, 1991), under a profile, that creates in favor of the declarative function and establishes the declaratory nature of a jurisprudential law of an Anglo-American type.

The conception of the formation of the rule of stare decisis seems evident but presents many controversies. Thus, the emergence of a problematic profile of a prodromal phase of the doctrine of binding precedent in the declarative theory is highlighted with outcomes that have a divergent and theoretical nature.

The binding nature of the judicial precedent proves an immutable right and changes the circumstances and cases towards decisions, which do not follow the precedent, that considers in an illegitimate way the possibility of overcoming the precedent according to the strength of an argument, which considers, that it is not deduced from a value superior to the judge. Consequently, the reasoning follows the ancient custom that is exalted in an original way ab iniuria.

The implicit dialogue, through a traditional methodological setting of classical common lawyers found in the reports, contradicts itself by giving rise to an actual decided balance, as a counter-thrust of a natural law nature overcoming a rule of

higher order and opening the space for an overruling. Thus, the precedent is overcome by the pre-existing basis in rerum nature every time, that with a correct way the precedent is observed and disregarded by correcting the previous decision, which is wrong and declares the law with a logical way and as it is believed to be.

The declarative theory elaborates and consolidates the precedent after the commentaries. It becomes dominant in England and in the colonies. The position of the common law arrives at the affirmation of a persuasive value of the judicial decision within the 18th century, which is consolidated in the practice of the precedents and far from the affirmation of a legal obligation with a substantial way to the English stare decisis.

Legal obligation through practice

Judicial precedents have a logical basis of a jurisprudential nature. They represent a need for legal certainty at a global level. The stare decisis is a phenomenon absent in classical common law (Duxbury, 2008).[2] Since the 19th century, the evolution of practice of legal obligation has imposed the precedent, which is binding for English law. This is a direction, which began way back in 1933 through the positions of judge Parke who stated:

2Duxbury affirms that: "(…) the doctrine of stare decisis is not innate to the system (…)".

"(...) the common law system consists in the application to new circumstances of the legal rules (...) derived from legal principles and judicial precedents; in order to ensure the uniformity, coherence and certainty of law (...) provided they are not purely illogical and out of place, to all similar cases that arise; and we have no possibility of disregarding them, or of refusing analogical recourse to them, preferring others never judicially consecrated (...) such rules are not as reasonable and appropriate as we would like them to be (...) keep in mind this decisional principle, not only for the determination of a particular case, but in the interest of law as a science (…).[3]

Consolidating a practice, that favors the development and diffusion of the relative law reports to a social role of traditional nature, means legitimizing one's functions of the power exercised, as a passage of rules, that are organized according to the English courts and the Judicature Acts of 1873-1875. It is a pyramidal judgment within the scope of rules able to operate in a structural way.

The cultural change and the opinions that rigidify the stare decisis seem to burst the legal positivism. The law of precedent was created by judges, as a fixed and immutable declaration of an expression of the common sense of human reason. It is a custom existing ab immemorabilia, thus affirming the idea of a right, as a positive law of every deviation from the precedent by judges, that equate in fact and act with the illegitimate type of legislation.

The binding nature of the precedent in practice, as a declarative theory, reinvigorates the positive conception, becoming formal the legal obligation, that is repeated by legislative acts.

3Mirehouse v. Rennell, [1833], 1 Cl. and Fin. 527: https://www.uniset.ca/other/cs3/6ER1015.html Accessed on 12.09.2025.

Binding and theoretical starting points remain opposite. The declarative theory of binding and the existence of a superior value generates a fixed right for legal positivism in the common law system especially in the works of John Locke, John Austin and Jeremy Bentham. It has given shape to the so-called analytical jurisprudence, that is, a binding nature that exclusively recognizes the law of the legislative power. Legal positivism unmasks, at an epistemological level, the fiction of the law of a declarative theory, that according to Austin:

"(…) employed by our judges that judiciary of common law is not made by them but is a miraculous something made by nobody, existing (…)" (Austin, 1875).

The anti-declarative conception considers jurisprudence a source of law. This profile is the basis and the position of John Salmond, who stated:

"(…) judicial precedent speaks in England with authority (…) evidence of the law, but a source of it; and the courts are bound to follow the law, that is so established (…)" (Salmond, 1901).

Thus, the common law as a matrix of a positive type invests a new legitimacy for judges. It is, in other words, a declarative theory, that remains at a cultural-juridical level of the English common lawyers, who acquired and founded the positive state law recognized as an organ of a state power.

The positive culture of a tradition of the common law, as a positive fact of "fétichisme de la loi" that naturally in Europe does not connect with the system of case law, has as a consequence the formation of a doctrine of binding precedent. It

is the fruit of a basis between currents of thought of a contradictory nature.

This is a conception, which is part of the words of Lord Campbell, who defined in 1861 the ratio decidendi in the judgments of the House of Lords, binding in the lower courts. The same Lords affirmed that:

"(…) it would be arrogating the power to change the law and to legislate by reason of its own separate authority (…)".[4]

Lord Halsbury in 1898 in London Street Tramways Co. Ltd. v. London County Council, stated, that this conception is a process of hardening of a stare decisis. It is established for the next sixty-eight years for the House of Lords and is bound by the precedents and agreeing with the words of Lord Campbell, who provided that:

"(…) the decision given by this Court on a point of law is subsequently binding on this Court (…) it is impossible to raise again a question identical with that already decided (…) of a res integra such as to be re-examined, asking this House to repeal the previous decision (…) ignore all precedents on the subject (…) an extraordinary case or an unusual case, that is to say a case in some way different from the ordinary ones, is sufficient to justify a new discussion and a new consideration in the Court of last instance of a question which has already been decided (…) there are currents of thought in the profession to support the erroneousness of such a decision (…) his position recalled the necessity of ensuring the certainty of legal situations (…) it is fair in comparison with the inconvenience (…) of making every question subject to retraction of human affairs doubtful because of different decisions, so that in effect there would no longer be a real final Court of Appeal (…)".[5]

4Beamish v. Beamish, [1861] 9 H.L. 274: https://www.uniset.ca/other/ths/11ER735.html Accessed on 12.09.2025.

5London Street Tramways Co. Ltd. v. London County Council, [1898] A.C. 375: https://www.casemine.com/judgement/uk/5a8ff8c860d03e7f57ecd5a4 Accessed on 12.09.2025.Lord Halsbury took into consideration the dimension of the constraint as self-precedent. Thus, the stare decisis justifies the requirement that does not call into

During the 20th century judges feared that they would not be able to steer towards a case law approach because of the increase in appeals and the rigidity of the relevant constraint in England. In this regard, Lord Wright stated that:

"(…) the previous decision must be regarded as if it were part of an Act of Parliament (…)" (Lord Wright, 1943).

The previous constraint seemed short-lived. Also, Lord Reid stated that:

"(…) judges should interpret precedents of the House of Lords as provisions of law (…) it is not the function of the honourable and learned Lords or of any other judge to elaborate definitions or formulate ironclad rules (…) and principles and what they express must be understood in an illustrative or expository manner and never as definitive (…)".[6]

Social changes have led the High Court itself to show precedents as being time-honored. This orientation has been supported by Lord Chancellor Gardiner in a practice statement, as an extrajudicial declaration that has been issued within the scope of a power recognized by the common law courts. A practice statement of the House of Lords in 1966 brought its own precedents to the constraint.

The use of precedent was presented as an indispensable basis for decisions and as a guarantee of trust of individuals within the certainty of the law, which recognized limits to the risks of a rigid adherence to precedent and within the determination of an injustice, which prevented the adequate development of the law.

question the content of the decision that has been pronounced by a body of the last instance and that defines the moment that concludes the jurisdictional procedure as a moment of verification.

6 Cassel & Co. Ltd. v. Broome [1972] A.C. 1027, 1085, H.L: https://uniset.ca/other/rossminster/broome.html Accessed on 12.09.2025.

This impact limits some clarifications that move away from the precedent, that is the House of Lords, that took into consideration:

"(...) retroactively (...) the bases on which contracts were made (...) tax agreements and also the particular need for certainty under criminal law (...) the ability to depart was admitted only within the House of Lords (…)".[7]

The practice statement thus captures, from a theoretical point of view, a precise fallout (MacCormick, Summers, 2016).[8] The House of Lords moved away from very few precedents,[9] that were always under discussion,[10] leading to principles that considered the technical revolution, which respected the Beamish and London Tramways sentences, as a rigid constraint of the precedent, that affirms the parliamentary laws (Cross, Harris, 1991).[11]

7Practice Statement [1966] 3 All. E.R. 77: http://www.uniset.ca/other/cs2/19661WLR1234.html Accessed on 12.09.2025.

8MacCormick and Summers affirmed that: "(…) in fact [the House of Lords] still adheres closely to its own precedents, departing only occasionally (…)".

9Miliangos v. George Frank (Textiles) Ltd., [1975] 3 All E.R. 801: https://uollb.com/blogs/uol/miliangos-v-george-frank-ltd-1976?srsltid=AfmBOooWsuzGygyh56B2YCdp6IpncYiiumNJLGYTekmdZ6G0G4d1okic (Accessed on 12.09.2025).In this case, a precedent from 1961 was overcomed after the anticipatory overruling of the court of appeal, which affirmed that the currency which fulfils and compensates for damages is not necessarily the pound.

10See the dissenting opinion of Lord Simon in Miliangos case, which in effect repeats the views of Lord Kilbrandon, who stated that it is intolerable to challenge a judgment which reforms the law by amending and revoking a ratio decidendi which has been previously laid down. It is declared that the amendment is not valid pro futuro and in a similar manner it comes to the relative promulgation of a statute by parliament. The question of effectiveness is retroactive in nature for judicial decisions and not related to the matters of the practice statement of 1966.

11Cross and Harris affirmed that the practice statement is a statement which is not comparable with a judicial decision. In a similar way, the practice statement, which considers the common law, is not suitable so there is an antinomy to the

This favours the role of judge that is in contrast with the foundation of Blackstone's declarative theory, that is, within the measure of a precedent whenever it appears right to do so.

A functional constraint. The distinction of the vertical and horizontal dimension of the previous constraint

The vertical and horizontal distinction comes from a higher court, as a binding and vertical precedent for the courts that are lower. In a horizontal sense such a rule binds the court and follows the precedents. So we must speak of self-precedent, which limits the reference to a unique horizontality to the hypotheses of the relevance of the precedent, which comes from other courts of equal rank.

The distinction of the English and American legal systems, that speak of self-precedent at a certain level of judgment, is enhanced, which provides for a court, such as for example the English Court of Appeal and the court of appeal as well as individual American states, the rule in a horizontal sense that does not operate with reference to the American system and the thirteen federal courts of appeals, which are not binding like the various courts of appeal that are present in some states.

This is a mechanism, that works and includes a hierarchy of courts,[12] thus binding in a tendential manner and in principle the

previous decisions, which are related to the London Tramways case.

12 See the Judicature Acts del 1873-1875, which have organised the English courts in a hierarchical way up to the present day.

self-precedent for the superior judges and the vertical precedent for the inferior judges. The position and functions of the jurisdictional bodies create a dynamic.

Especially for the inferior judge, the vertical operation justifies the placement at a lower level of a judicial pyramid system, which respects the level of the judge of the precedent that comes from. For the superior judge, respect for the self-precedent conforms to functions, which guarantee the uniformity, coherence and certainty of the law.[13]

The self-precedent and the operation of stare decisis is present and affects the jurisprudence of the superior courts with intensity, respecting the vertical constraint. This reference is part of the American legal system, as well as the English one, also observing, that the Supreme Court of the United States, which has not heard the precedents as can be seen in the practice statement of 1966. The English House of Lords has taken a position according to the obligation of absolute terms.

On the contrary, the intermediate courts observe coherent rules of their decisions, which in a flexible way, especially in the United States as well as in England, have a certain binding nature.[14]

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13 Mirehouse v. Rennel [1833], 1 Cl. and Fin. 527.

14 Young v. Bristol Aeroplane Co., [1944] 1 K.B. 718 (C.A.): https://www.lawteacher.net/cases/young.php (Accessed on 12.09.2025). In this regard, until 1895, the constraint of self-precedent in the court of appeal did not rigidly hold precedents. In this spirit, is the Pledge v. Carr, (1895), 1 Ch. 51 case.

As an exception are the hypotheses, which indicate for the lower courts the rules of self-precedent, which is not in conflict with the functions of the judges, which evidently fall within the pursuit of the uniformity of the jurisprudential orientations (Cross, Harris, 1991).[15]

15 Young v. Bristol Aeroplane Co., [1944] 1 K.B. 718 (C.A.): "(…) the power to decide, which of two conflicting judgments issued, by itself it will adhere to; 2) the Court is obliged to refuse to abide by a judgment it has itself given which, even if not expressly contradicted (…) is compatible with a judgment of the House of Lords (…) it is not obliged to abide by a judgment it has itself given that that judgment was given per incuriam, as in the case where a statute or a provision having the force of law, which would have influenced that judgment, had not been brought to the attention of the previous court (…)". In case: Gallie v. Lee, [1969] 1 All E.R. 1062: https://vlex.co.uk/vid/gallie-v-lee-792540633 (Accessed on 12.09.2025): "(…) the Court of Appeal should have legitimised itself to go beyond (…) its own precedents, in the wake of what was stated by the House of Lords, through the Practice Statement of 1966 (…). The position in question starts from an intermediate one, within the hierarchy of the English courts, of the Court of Appeal. The power of the House of Lords (now Supreme Court) to overrule its own precedent, in fact, would be justified (also) by the fact that no means of appeal is permitted against the decisions of the latter (...) the power in question had not been recognised; this is not the case for the Court of Appeal, since it is possible to appeal before the highest body against the decisions of the latter (...) the highest body itself to overrule the precedent of the intermediate court (this being clear, as it is a hierarchically superior court), without thereby undermining the certainty of the system (a phenomenon which instead, according to some, would occur by attributing a similar power directly to the Court of Appeal). It could however be objected that, in fact, the Court of Appeal (...) the vast majority of cases do not reach the Supreme Court, due to a rather narrow and discretionary selective filter (...)". In the R. v. Newsome and Browne, (1970) 2 QB 711) case: https://vlex.co.uk/vid/r-v-newsome-r-793016161 (Accessed on 12.09.2025): "(…) the principles of sentencing are not seen in the same way as "substantive rules of law"; b) the ability to override one's own precedent, when the Attorney-General appeals to the Court of Appeal for a "point of law" relating to a case of acquittal by a lower judge; any self-overruling in this case will only have effect for the future, as it cannot call into question the acquittal pronounced by the lower judge (...) Court of Appeal (Attorney-General's reference (no. 1 of 1981) (1982) 75 Cr. App. Rep. 45); c) the power to depart from a decision unanimously, preferring the favor libertatis of the defendant (R. v. Taylor (1950) 2 KB 368, 371) (…) R. v. Jenkins (1983) 76 Cr. App. Rep. 313, 318, but which subsequent application practice has partially disregarded (…)".

Judicial precedent: opinion, reasoning and decision

Judicial precedent interprets and respects similar and dissimilar cases, such as the resolution of an abstract question of a case, that includes constitutive elements, i.e. comprehensive for the inherent facts. Thus, the resolution for reasons of the decision does not confuse the device and the result of the resolution of the case.

The constitutive elements of the precedent have to do with the opinion, reasoning, decision. Three structural steps for the Anglo-American sentences.

The opinions of individual judges form the decision and the opinion of the court, as a reaction that entrusts a single judge with the possibility, and in the specific case for individual members of the North American court, to present a dissenting opinion, that respects and shares the decision and the reasoning.

From a technical point of view, by opinion we mean the legal argument, that the judge has created a varied heritage of statutes and precedents at his disposal, thus expressing his own decision, which is not suitable for solutions before the pending case. This is, however, suitable to create a hypothetical solution to similar future cases.

Judicial pronouncements have a dual function, that is, of decision but also to establish rules of law for the near future. These are distinct but also complementary plans of a precise and

abstract type (Traynor, 1977).[16] And all this as an objective element, that generally characterizes a declarative genesis of the law, as a creative function by the judge and by jurisprudence.

The opinion also includes the reasoning and the decision. The reasoning leads to statements of an incidental nature, that is, of obiter dicta, which is devoid of connection with the argumentative contents to a rationale, that thus founds the decision to a device, which supports the explicit, implicit principle of a resolutive nature as ratio decidendi.

The stare decisis and the opinions do not have a binding nature for all the parties. Starting from an elaboration of techniques, that have to do with the interpretation of the sentences, are considered in a classical way according to the positions of John Salmond between the end of the 19th century and the beginning of the 20th century in England and during the time consolidated by the American doctrine such as Eugene Wambaugh, Henry C. Black (Black, 1912, Carleton K. Allen, Percy H. Winfield (Winfield, 1925) and Arthur L. Goodharth.

The conceptual categories are in consequence compared and constitute a theoretical work of the stare decisis.

16Traynor affirms that: "(…) a judicial decision, relating to events that have already occurred, naturally looks backword (...) a judge is bound to make constant use of the eyes at the back of his head, but he has also a responsibility to keep a weather eye forward (…)".

Obiter dictum and ratio decidendi. "Universal" decisions and limitations

As we have predicted, the judicial precedent takes a position through the ratio decidenti and the obiter dictum. Not everything about a judicial decision is based on the precedent, but only the ratio decidendi has binding effect. It is the reason for a decision as support for justification.

The ratio-obiter relationship includes the concepts of opinion, reasoning and decision. This explains the North American jurisprudential line, which indicates the term holding that calls the idea of the decision from the judge. The ratio decidendi identifies logical-argumentative elements, that justify the decision relating to these principles. The ratio decidendi is connected to the holding as a diversified terminology, that decides and frees the anti-formalist vision of a definition of the ratio decidendi, which respects the efforts of the English and North American doctrine in a formalistic way.

The ratio decidendi has been constituted in a general and abstract way forming its own binding nature. According to the position of John Salmond the judicial precedent is a judicial decision, a principle that constitutes an authoritative element that calls the ratio decidendi in a binding way between the parties having a universal nature.

The jurisdictional nature is individual and is applied on a measure of a decision that refers to a subject of a situation that has to do with factual situations. The universality of an individual proposition, which as a rule of principle, has a general and abstract character, is concretized in a broad way to subjects and situations of universal proposition.

The perimeter of the ratio decidendi binds the judge, who depends on an operational interpretation of a previous decision, which is binding on a smaller or/and larger number of cases. As a consequence, the relative facts are constructed at an abstract level. Additionally, the cases are precise and governed by a rule of law. The constraint of the ratio it is thus expanded by privileging the functioning of the stare decisis, as the main index of a discretion of the judging subject.

The abstract and general level of the ratio decidendi collaborates and is configured, as a universal rule, in a suitable way for the application of analogous cases of a common law jurist. In this way, the ratio remains connected with the facts of the case of a general nature. According to Henry C. Black the ratio decidendi is abstract and respects the facts of a legal principle that determines a particular decision.

The ratio, close in the hypotheses of the member of a court, indicates with precision, that the third pronounces and accepts the objectives of the decision. Thus, an affirmative majority is

not reached to the ratio and the case is considered as a precise rule of law. As can be seen in the positions obtained by Lord Greene in Gold v. Essex County Council [1942] 1 KB 293, 298 the relative majority reaches a ratio, that is constituted to a proposition, that indicates the general majority, that respects the minority.

The arguments involve the English legal system, as a component of a judging panel to a personal opinion. In the North American legal systems the outcome of the judgment seeks to draw up an opinion of the court, that is the possibility of drafting the dissenting, concurring opinion as a prerogative of the minority.

Lord Halsbury in Quinn v. Leathem case used the term "actually decides".[17] This expression has not been taken literally in consideration. For this reason the precedent is confused with the res judicata, which states a position, that limits and establishes the inter partes. Such a declaration comes from the limits of a ratio decidendi, which provides motivations ultra partes. Thus the resolution that is applied does not contemplate relevant differences with respect to the precedent.

No case is identical to another and the investigation is reasoned on factual elements, which with an interpretative way are considered material or immaterial arriving at the application of the ratio to a decided case, which corresponds to material facts

17 Lord Halsbury, Quinn v. Leathem, [1901] AC 459, 506: https://www.lawteacher.net/cases/quinn-v-leathem.php Accessed on 12.09.2025.

as in the case of those to be decided (Cross, Harris, 1991).[18]

This is a universal operation that justifies the functions, the modalities of an exercise of jurisdictional activity, as a principle that separates powers. Within this profile the judge intervenes to resolve disputes by specifying his justifications unlike the legislator, who provides abstract and general rules. In general terms, democratic legitimacy offers judicial choices that respect political ones (Summers, 1994).[19]

Ratio decidendi and criticism

The stare decisis, as a logical procedure of a two-phase nature, leads the judge to an obligation, that follows the previous data oriented to an identification of a ratio decidendi, which correctly uses the new cases pending before him. Thus, a step is foreseen, which leads the operation of a hypothetical nature, through a consequential operation.

The obiter dicta thus isolate the principle of law, which applies through material facts and leads to the solution of the judicial

18Cross, Harris affirmed that: "(…) the observation according to which the interpretative operation of the subsequent judge (…) of the one who ruled before him (…) is always and in any case decisive (…) free to find differences between the case already decided and the one to be decided (…) the material facts can be considered similar to each other or to valorise the presence of a factual element that did not appear in the previous case (…)".

19Summers affirmed that: "(…) limits cannot be considered so rigid or in any case unequivocally recognized in their scope as to distinguish with certainty the admissible universalizations from the admissible ones, but they still constitute expressions of guiding ideas that can be usefully taken into account in approaching the Anglo-American case law (…)".

precedent without a decision, that considers it binding, thus becoming for the judge a reason for the decision, that is, a reason to decide.

The judicial precedent in its identification builds for the judge a relevance of a theoretical plan, thus arising a force of an interpretative operation. In the second phase, the relative legal principle is applied, which establishes the precise factual situation, which reaches a decision of the case. Thus, the first phase, which is inevitable, leads to the outcome of the second, that is, the definition of the ratio decidendi in its content.

The reconstructions do not record divergences, that are worthy of evaluation and the notion, thus, outlines the concept of necessity that constitutes the ratio as necessary with objectives based on a previous decision. According to Eugene Wambaugh, it is noted:

"(…) the general rule without which the case would have been decided differently (…)".[20]

This is a setting that takes into account the opinions of John C. Gray (Gray, 1909),[21] Rupert Cross, James W. Harris (Cross, Harris, 1991), Carleton K. Allen (Allen, 1964)[22] and D. Neil

20 Carroll v. Carroll's Lessee, 57 U.S. 275, 286-7 (1853); Chief Justice Vaughan in Bole v. Horton (1673) Vaugh. 360, 382: "(…) a statement expressed by a court, if it is not necessary for the judgment, but could well not exist or be opposed in its content as if nothing had happened, is a statement without legal value, nothing more than a gratis dictum (…)".

21 Gray affirms that: "(…) a statement can have the weight of a precedent, it must be a statement whose articulation is necessary for the decision of a particular case (…)".

22 Allen, affirms that: "(…) every judgment, of every court, has authoritative value only to the extent of that part of it, called ratio decidendi, which is considered

MacCormick (MacCormick, 1987).[23]

Consequently, from a theoretical point of view, the limits at a practical-applicative level, are highlighted, as a criterion that arises from an interpretation oriented with certainty in the search for a rule, that is, of an objectively necessary principle. Thus, the operation of a natural and subjective margin evaluates the proposition necessary to the previous judge.

The outcome of the process, as a ratio recalls the words of Wambaugh, who elaborated and defined the inversion of the rule, as a necessary legal proposition. In this sense, the author hypothesizes the formulation of a meaning, that verifies the decision of a reversal. Such a proposition is evidently necessary for a ratio decidendi.[24] As has been underlined (Cross, Harris, 1991) the limited value presents itself, as an equation that refers to the motivation of propositions of a general nature, that passes the test that considers them as excessively general and abstract reasons.[25] In these cases, in practice and in theory, the authority

necessary for the decision of a specific controversial question (...)".

23MacCormick affirms that: "(…) the ratio decidendi can be defined as the rule explicitly or implicitly dictated by the judge, which is sufficient to decide a point of law in dispute between the parties, being a point on which a rule was necessary for the justification (or one of the alternative justifications) of the decision of the case (…)".

24MacCormick affirms that: "(…) First frame carefully the supposed proposition of law (...) him then insert in the proposition a word reversing its meaning (…) then inquire whether, if the court had conceived this new proposition to be good, and had had it in mind, the decision could have been the same (…)".

25Cross, Harris, affirmed in page 239: "(…) general dicta (which belong to the broad and varied set of obiter dicta (…) would exceed the test because their reversal is incompatible with the decision, even though their excessive generality prevents them from being considered rationes (…)".

of a proposition is recognized, which remains to the rigorous application of an equation that leads to a binding path.

The test does not implicitly validate the ratio decidendi and does not directly set aside the previous judge. The truth concerns cases of a ratio, that are expressed in the absence of a problematic result, i.e. a framing of supposed proposition of law, as an explanation of a proposition that motivates itself.

The use of such an equation derives from an implicit rule on the basis of the facts that inverts, to verify, the final objective. In this way, the ratio decidendi is configured without binding and valorizing a number of motivated decisions, which translate the general principle, in a precise and specific way. In this way, the obiter constitutes a tertium genus between obiter and ratio in a suitable way, as a burden that motivates the judge, who intends to depart from this principle.

The precise rule inevitably returns to facts that intend to structure its own proposition (Cross, Harris, 1991).[26]

It is considered, that the test approves the application only in the hypothesis that is not frequent and that the resolution depends on a question that corresponds to the ruling of a single proposition. It is not a frequent case of solving a case, that follows alternative paths, as an outcome that reaches rules of principles, that are necessary, as well as alternative ratione

26Cross, Harris affirms that: "(…) the student is entitled to ask what facts, all the facts, all the material facts, whatever that they mean, or facts regarded as material by the judge (…)".

decidendi. As it is also considered, in a unique way, the rule that pronounces the plurality of questions and the resolution that appears necessary for the purposes of a decision are considerd, as competing rationes decidendi.

All these rationes that have a competing and/or alternative nature are considered as binding to a subsequent judge, who records a judicial practice and recognizes the authoritative heat between them. The propositions, in principle, have granted the reason of the ratio decidendi, that also identifies the obiter dicta for the integral parts in the basis of the decision. In this regard, Lord GREER in London Jewellers Ltd v. Attenborough [1934] 2 KB 206, 222, CA case repeated the lines of the Commissioner of Taxation for New South Wales v. Palmer [1907] AC 179, 184 case in stating that:

"(…) it is possible to treat a proposition declared by a court as an independent and sufficient basis for the decision, as a mere obiter dictum simply because another proposition appears which, by itself, might have determined the same decision (…)".

Crowther v. Thorley (1884) 50 LT 43, 46 case an obiter is seen as a consequence of various propositions of a decisive nature for the species, on which the exercise of a discretionary power of a judge depends (Cross, Harris, 1991).

The subsequent judge should decide on two or more propositions, which establish a ratio, which remains as obiter until the rationes have a conditionally binding. As a consequence, the ratio, that is rejected by a superior and/or peer

court considered overruled at the moment that it starts as pending the estate of the propositions that bind the judge. The judge, thus does not ignore the propositions, who consider as obiter.[27]

The exclusion of facts, within the scope, that validates the equation, justifies the necessity, that avoids a contradictory logic. The test does not work and leads to a result in a paradoxical way, which considers the alternative and justifying prepositions of the decision.

The obiter dicta does not find the ratio and thus indifferently reverses the objectives of a decision, which remains supported by the other. On the other hand, the exclusion of a class of cases justifies the choice of limitation and the effectiveness of an equation, which presents a rule in a necessary way, in accordance with the objectives of a decision.

The test works in the presence of propositions, which contribute to an equal level of justification, which reverses one and the other is enough to support the decision. Thus the relationship of interdependence proposes and results in a necessary but not sufficient way. It does not perform the test in the presence of competing rationes and the problem is intuitive and effectively establishes the relationship of interdependence between

27 Lord Denning in Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd. [1958] AC 20, 53: https://www.isurv.com/directory_record/3268/bettys_cafes_ltd_v_phillips_furnishing_stores_ltd (Accessed on 12.09.2025); Ministry of Defence v. Jeremiah [1980] 1 QB 87): https://vlex.co.uk/vid/ministry-of-defence-v-793667849 Accessed on 12.09.2025.

pluralities of propositions, which are productive operations of results that are univocal. Thus, a similar hypothesis is left out of the equation, which focuses on a relative and relevant terrain.

As a contrasting element relative to the modus, which identifies the ratio of the pending decision, is the attribution to the facts and statements relating to the opinion. We note, in this regard, the position of Arthur L. Goodharth, which is part of the baggage of common lawyer. We take into consideration (Goodhart, 1930) the ratio decidendi, which looks at the precedents as well as the relevant facts, which are read within the content of the dispositive.

The final objective of a fact-dispositive relationship leads to the principle of the case and the reasons for a basis of the decision that has no relevance to the objectives of identifying the ratio and the facts, that are considered as relevant. Thus, the rule of law comes as a set forth, enunciated in itself general, abstract, wide and excessively precise and narrow.

In a decisive way the examination of factual elements results from the evaluation of a completed relevance of a subsequent judge, who carries out from the previous judge in measures “of furnish us with a guide” (Goodhart, 1930).

This contrasts with the orientation promoted by Julius Stone (Montrose, 1952; MacCormick, 1978, Cross, Harris, 1991; Duxbury, 2008), that every material fact derives a proposition at

general and abstract levels (Stone, 1945). Thus, Goodhart's criterion does not seem useful in conducting the formulation of various rationes.

Additionally, it is attributed decisively to statements that are contained in the opinion. The need for a proposition, that is sufficient precisely and on the basis of the facts, is decisive for the facts deemed relevant by a previous judge.

It is a problem of interpretation, that in judicial practice, favors the analysis of sentences, which affirm, revoke the rule of common law by valorizing the contents of their motivation, as a partial perspective and in the presence of decisions, that depend on an application of statutory law.

Tradition prevails, in principle, in words, that are interpreted by statutes and that do not replace words used in the text of the law, that is, in parliament as an encroachment of a judicial power. The primacy of factual elements based on the device is recognized, which extract a binding proposition based on explanatory, argumentative findings.[28]

28Paisner v. Goodrich [1955] 2 QB 343, 358: https://www.casemine.com/judgement/in/5609096de4b014971116fa78 (Accessed on 12.09.2025): Lord Denning affirms that: "(…) the judges (of the Court of Appeal) decide on the interpretation of a legislative act, that decision is binding for the future in its content (…) but the words which the judges use in making the decision are not binding (…) the decision must necessarily be expressed in words, on the other hand it is a real distinction if one bears in mind that when it is necessary to apply a statute the only function (…) is to apply the words of the law to a given situation (…) to conclude that whenever a new situation of fact arises, outside the subject-matter of relevant precedents, the court must be governed by the written law, and not by the words of the judges (…)"". In the Lord Reid in London Transport Executive v. Betts [1959 AC 211, 232]) case https://vlex.co.uk/vid/london-transport-executive-v-793447309 (Accessed on 12.09.2025). It is affirmed that: "(…) in practice there

The precise implications of a hermeneutic criterion seems less significant and are limited to the affirmation of the judicial precedent, which forms a lex scripta to the extent of an interpretation of a term of a certain act, which does not consider as binding the interpretation of a term, but is contained in a legislative text.

The words of the judge are binding given, that are remained within the sector of a legislative right, as a question of motivational passages, which resolve in a systematic way the principles of the law, that comes out of the narrow space of an element available in writing and which structures in a decisive way the formulation of a decisional rule.

Regardless of the acceptance of the criteria for extracting a ratio decidendi, the Goodhart method is practiced in the presence of a ratio decidendi, which explicitly implies the rule, which is missing from the results, which are in the shade. We immediately recall the case law reports that represent the instrument, that the precedents are known from the fact and without argumentative remarks to a device.

The hypotheses, which includes the meaning of the expressed proposition is controversial with the generic proposition to act as an authentic guide for the subsequent judge. There are doubts

would be no difference (…) between a decision which revolves around the interpretation of a legislative provision and another which is based on any other point of law (…) this second conception appears to be more in line with the English operational reality (…) the question does not concern North American legal systems, in which it is therefore accepted in fact (…)".

based on the determination of a scope of operation.

The relationships of the facts, that are relevant with the device are put in order, as a rule that is universal and of a precise degree. These decisions consider among themselves a general, abstract level, that is reasoned to a single precedent and on a series of closed precedents.[29]

In such decided cases it is evident that the common minimum consists of a principle of law, which is not explicit and the related decisions allow a group of a number of precedents to a total group of set.

An express rule goes back to the definition of a ratio decidendi, which includes cases that lack the general legal preposition of the circumstances of a logical decision of a judicial decision and a proposition that is declared in the opinion. Thus, the opinion of the judicial precedent is explained as something explicit (Cross, Harris, 1991).[30]

29Wells v. Hopwood (1832) 3 B. & Ald. 20: https://vlex.co.uk/vid/wells-against-hopwood-803683193 (Accessed on 12.09.2025); Lord Tenterden affirms that: "(…) many of the cases so far decided on certain subjects are very close to each other, and not easily distinguishable (…) a general principle or rule of law can (…) be reasonably deduced from the great number of them (…) not explicitly stated in any of them (…)".

30Cross, Harris affirms that: "(...) they define ratio as any rule of law explicitly or implicitly considered by the judge, as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him (...) in the case of alternative or competing rationes decidendi (...) a necessary part of his address to the jury (...)".

Obiter dictum

The obiter dictum does not bind the subsequent judge, who respects the residual nature of a relative notion. An obieter dictum does not set a precedent and is placed within the perimeter of reasons, that justify the decision, as a result of an unnecessary ratio decidendi. It remains extraneous to the rationes and within the sphere of obiter dicta, gratis dicta, dicta propria or dicta (Cross, Harris, 1991).

The prevailing opinion does not dwell on the meaning of the expressions, which thus absorbs the notion of obiter dictum. The attempt to provide conceptual autonomy in these terms is acceptable and concludes in a distinctive and prospective way a theoretical plan using the terminology of comparativism, that is devoid of any system of operation, that distinguishes in a superfluous way what can be defined as judicial dictum.

The question is defined as an obiter other than a proposition, that is part of a ratio. Geoffrey Marshall puts limits on a negative definition by establishing the obiter of a decision, that does not consider binding the functions of an economy of reasoning, which assume and present judicial propositions, that is, judicial dicta and not statements and questions of fact. It is thus noted a distinction of some obiter, which present the facts, as irrelevant in the case that the question is important; the facts of the case as relevant but not necessarily also for the decision;

marginal questions as relevant; questions presentable as relevant in other cases.

The classification of the functions of obiter in terms of an incidental statement, as a function of an argument ad abundatiam, that is, beyond the need and in relation to a deciding ratio of the case, is an incidental, indirect statement of the ratio according to the cases. Thus, the preparatory, anticipatory function builds a rationale for a case, that reinforces an applicable and question-related rationale for an anticipatory, preparatory overruling of a case that has to do with the question.

Thus, an obiter has a psychological impact on a judging subject with persuasive effectiveness. It marks the argument of a well-reasoned dictum in the court it comes from.

The authority can adopt an obiter dictum at the level that results in an opinion also from doctrine (Cross, Harris, 1991).

The obiter in a relationship, that considers the reference parameter between the judging court as a whole examines in the American experience facts, that are historically configured by the judges as decisions on behalf of the entire court, which distinguishes the contribution of individual members to a final result, that presents in a separate way their own dissenting or concurring opinion.

The English legal tradition on the other hand is characterized by the style of drafting the sentences, that sequentially describe the

scope of the obiter.

The reconstruction of the notion of obiter dictum is presented, as an element connected to a case other than a sub judice. The fact and the question, that are inserted into a hypothesis of an argumentative discourse of a motivation, are different.

The prevailing opinion is preferable, which specifies and accepts the corpus of the obiter and the general statements inherent to the facts of a case, that is connected with the ratio decidendi, therefore, does not elect the foundation of a decision. It refers to the general dicta and to the statements that are in contrast with the arguments of the hypotheses under examination.

The criterion of a ratio decidendi is a rule of law and of the rationes beyond the obiter. They are understood and engraved as not necessary for the solution of the case. The provisions of the parties and the object of the case, as a universal level ruling and rules of experience by the judge, try to resolve the question as quaestiones facti.

The position of rationale, that is the intention of a set of justifying elements of a ratio decidendi has political, logical and legal bases posing doctrinal opinions.

According to Goodhart, Cross, MacCormick this position is considered as a rationale of a group of obiter dicta based on the principle of a single part of a binding sentence, which is the ratio decidendi (Cross, Harris, 1991).

The separation of a ratio rationale is admitted, which attributes binding efficacy also to the second (Goodhart, 1930).[31] According to North American jurisprudence it is highlighted that the rationale is not separated from the ratio and does not conclude the binding efficacy, that the second attributes.

The idea of a rule of law specifies, interprets and applies the reasons that constitute the foundation. If the ration does not bind and does not condition in a decisive way the operational scope of a ratio decidendi it can apply a certain ratio to a case. This application, however, does not pursue other different objectives.

The common law judge is de facto bound to a ratio decidendi

The interpretative activity of a judge is very important and decisive. He states that the doctrine of binding precedent does not operate in facts and discretionary choices, which operate to a subsequent judge, who dispels doubts that are susceptible in a decisive way to the outcome of a trial. Thus, he does not consider the possibility of making a distinction between deciding and the exercise of the power of overruling in a binding

31 Goodhart affirms that: "(...) a stricto sensu binding value of the precedent in our legal system, states that we can only speak of a persuasive precedent, and therefore necessarily including the ratio decidendi and the reasons that support it, in order to explain some form of effectiveness (...) an argumentative or justifying part of the decision, given that the resolution of the case and its justification or argumentation are one and the same (...) the separation between ratio and rationale (...) without including the reasons given in its support, which as a rule act as a compass to understand the content of the decision (...) sharing this position in a legal system, such as the English one, in which the precedent is formally binding (...) almost like a quid similar in structure to a legislative provision (...) where the reasons are missing (...)".

way to a specific proposition, which remains between ratio and obiter to the hypotheses of a legal proposition, which considers as general and not binding an obiter in the ratio of a case to be decided (Williams, 2010).

The resolution of a problem to the content of the ratio decidendi and the decisional rule at a general, abstract level of a proposition, builds a space to the fact, which motivates and does not reflect the meaning to a measure that adopts interpretative criteria valorizing arguments of a systematic, constitutional, extratextual nature, etc. The need for a ratio as a treatment that reserves alternatives rationes decidendi, implies to what extent it values a series of judicial precedents.

Isolating the ratio decidendi objectively guarantees the rule conceived by the previous judge, which is the outcome of a difficult process of normative construction, which leads the judge to a rational interpretation of propositions contained as motivations of a sentence, which translate the re-elaboration and adaptation of principles, which establish and refer to questions of law and to the objectives of the decision.

Distinguishing as a technique

The physiological, necessary operation to the stare decisis system, which does not consider a given precedent as binding, includes some differences between the facts to be decided and those inherent in a case already decided.

The first procedure is that of the analysis of the fact, as a conduct opposed to an operation, which identifies a precedent relevant to the case in question. It was Robert Summers, who tried to affirm, with a positive outcome, a judgment of relevance already decided as a result similar to deciding in terms of relevant legal questions and in common law systems, as the legal question, that enriches the similarities of the material facts (Summers, 1994).

The analogical evaluation of questions involved is necessary for factual implications of an analogy of legal questions to facts of one and/or the other case.

The distinguishing technique before a judge refers to a precedent, that is relevant to the case pending before him. It realizes the facts of one or/and the other case, that differs with essential aspects and results in the invalidity of a ratio decidendi of the first and second case.

The facts are different and not decided, through the use of a regula iuris. The analysis of the fact makes the distinction possible. Thus, the previous species are distinguished, as a manifestation of a need to apply a different legal rule. In front of

a case different from the one that is distinguished, another precedent is framed, which in the presence of a leading case not regulated by the precedent, needs a new legal rule.

The constraint of the precedent is also not necessary for the facts that are identical. From a naturalistic point of view, no case is identical to another. Each case presents itself as a precise unicum that respects all the others and moves within the category of a difference where the distinguishing technique operates in a similar way to the major differences, that are assessed as relevant.

The physiological dimension outside the precedent allows the distinguishing technique to operate in favor of an analysis, that enhances the interpretative exercise of an authentic research within the scope of operation of a legal rule and a ratio decidendi. Within the scope of legal interpretation, that characterizes a great level of subjectivity and recommends with reasonable use the distinguishing technique, are avoided the pathologies used to a power, that leads in extremis to the effects of a precedent, which does not please the judge who is called to follow it.

As a consequence, it is transformed into a technique of stare decisis, as a phenomenon of a measure, which in a rigid way constrains the practice of the courts to arrive at a technique that goes beyond the control of a previous decision not appreciable

in a direct way.

Overruling and its own power

The judicial precedent does not distinguish the pending before the judge and configures a case in a possible and outdated way with a contrary way. This problem clarifies that the stare decisis is in contrast with the overruling and reconcilable within the limits that are foreseeable.

The overruling of a judicial precedent lays the foundations for revoking the regula di iuris previously used and replacing it in a different way (Cross, Harris, 1991).[32] It is a distancing from the precedent made by a lower judge. It exercises a power that configures as an overruling, that with an implicit way remains until the subsequent levels of judgment. In such a way, it eliminates the decision that challenges the precedent with a non-compliant way, within the scope of a distance, that substantiates the overruling, thus distinguishing the precedent not followed with a simple and unknown way from a conscious neglectio to a precedent, that is not intended to be taken into account.

Thus, it is established that the ratio decidendi removes from the previous data the validity to regulate in analogous and future cases, what is pending.

32Cross, Harris affirmed that: "(…) the typical effect of overruling is described as a (making) the law in some sense the contrary of the proposition for which the ratio decidendi was formerly authoritative (…)".

The judicial revocation with retroactive effect, in measure of a new rule with direct way, applies and decides facts, that are committed under the previous revoked. It starts from the case of a judgment instituted before the judge, who exercises the power of overruling and that passes to other analogies, that institute judgments at times before different judges arriving at future judgments that concern those committed before (Diplock, 1965; Traynor, 1977; Cross, Harris, 1991). The overruling in essence:

"(…) rests in the absolute judicial discretion of the court (…) and within the certainty of the system that imposes in a rigid way the constraint, that is connected with the responsibility of each judge. The answers allow and seem to vary other referable contexts" (Black, 1912).

The classical theory is based on the judicial precedent and in the declarative theory of the common law, which in England perceives the influence of the overruling, which is nothing but a retrospective one that is applied.

The judicial precedent, thus, manifests in a wrong and absurd way the previous decision and revokes what is not in law. Thus, it declares that such law practices the retroactive overruling considering the Clackstonian function within the perspective, which conceives the turning point with effectiveness, which continues to apply the revoked precedent for the case in question. This practice, is part of the prospective overruling, which was developed in the United States and in the philosophical-cultural reasons unknown in England and in relation to the declaratory nature of the common law, which

admits a judge law-maker.

The application of a rule of law in relation to facts committed before the affirmation is unjust and reveals the obstacle factor, that is appropriate to correct past errors and to adapt to a rule of conduct, which changes the conditions of a relational life observing, that such retroactive effectiveness is not considered to an indefectible character of jurisdictional pronouncements, which concludes the moment, that implements the judicial revocation to an alternative model.

Injustice manifested in an erroneous manner and not shareable with the judicial precedent

A rigorous stare, that surpasses the judicial precedent respects a series of matters, that indicate the orienting line of the classical theories of a privileged nature, which protects the bond of adhesion to the precedent with a rigid manner. In this way, the criticisms, that effectively follow the decisions, are avoided. The protection of trust identifies the rules, that consolidate the time of the jurisprudential sources while also guaranteeing the discipline, that is based on governing one's own affairs.

The rules of property and the of contract (Larremore, 1908) reach the rules of procedure and/or of practice, that rigorously foresee the ratio of a privilege different to the questions of a procedure, which detects as a tool of uniformity the adhesion to

the judge and as an organizational basis of the work the lawyers involved.

The concern of the overruling for decisions on the subject of lawfulness/unlawfulness of a conduct concerns above all substantive criminal law. Also in the private sphere the subject of torts, fraud, good faith and negligence, etc. values the peculiarities of individual cases.

The public policy cases in North American law prefer political decisions connected with the constitution and the precedents of law. The overruling in these cases of precedent err rendering ab iniuria the principles of the system. As a consequence, in this case, the subsequent judge is of the same level with that of the first degree. It is doubtful whether the argument has to do with the situation of the overruling, that proceeds to a lower court judge. In this spirit, the line of Blackstone is highlighted, which arrives at the adherence of a constraint.

The judicial precedent, thus, seems to be unjust and not shareable to the judge, who calls to follow, from a theoretical point of view, the classic approach of non-privileged matters to an adherence to the constraint and to the protection of the corpus of law, which prevails over the reasoning of a single individual.

Blackstone's position is part of the declarative theory, which analyses, within a spirit of natural law and on a theoretical level the rigorous, the stare decisis as a precedent ad iniuria, that is, as

a non-law that should not be followed by a subsequent judge, who is called to do so.

There are no doubts about the binding nature of a judicial precedent of a higher court towards a lower court, which does not adapt to the wrong precedent and which distances the precedent in an evident way, that declares the law as what it truly is.

The North American experience

The operational reality of the British experience as well as the North American one are different and translate into a recourse to overruling in both systems. In the English system the power of the practice statement of 1966 is not effective, which remains in the measure of a declamatory plan.

In the North American one the overruling was always used in a gradual way to a non-fast system, which brings the principles in a balanced way with new ideas.

The reasoning of serious and strong reasons on the basis of the changes in jurisprudence of the New York Court of Appeals represent in a paradigmatic way orientations to the American judge, in this regard.

Are noted the major types of justified overruling, according to the developments and technological innovations of a previous data, that seems backward and not in use;[33] the socio-cultural

33 See the opinion of judge Cardozo in case. MacPherson v. Buick Motor Co.,

changes for the principles and reasons, that are based on previous data that are tolerable;[34] as well as the experience that takes the previous data as erroneous, that is conceived from the beginning.[35]

The superior judge of common law before a judicial precedent, which is relevant to the case in question, affects a ratio decidendi, with a self-binding way, which considers and distinguishes the legal basis of cases that are placed in comparison and with a binding effect for the judge of authority.

The judicial precedent thus legitimize a chosen interpretation, which considers as valid the considerations, which affirm the use of the preferred technique for the North American judges, who remain at the overruling, also motivating the precedent, that does not deserve to share the mistake. There are conditions when a certain question emerges at a second moment and the current case does not correspond to what has also already been seen.

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217 N.Y. (1916): https://www.nycourts.gov/reporter/archives/macpherson_buick.htm (Accessed on 12.09.2025):"(…) the things subject to the principles do change (as) the needs of life in a developing civilization require (…)".

34 Woods v. Lancet, 303 N.Y. 349 (1951): https://casetext.com/case/woods-v-lancet-1 (Accessed on 12.09.2025), which overruled Drobner v. Peters, 232 N.Y. 220 (1921): https://casetext.com/case/drobner-v-peters-1 and affirmed that: "(…) a child could not be compensated for prenatal injuries suffered in the ninth month of pregnancy – for the declared purpose of adapting and altering (the) decisional law to produce common-sense justice (…)".

35 People v. Nixon, 248 N.Y. 182 (1928): https://casetext.com/case/people-v-nixon-26 (Accessed on 12.09.2025), "(...) is duty (of the Court) to refuse to perpetuate previous error (...)".

It is taken into consideration the fact, that the overruling is exercised only by a superior court, which distinguishes the operation, that interprets and reaches a lower judge. The use of the distinguishing in place of the overruling arises for a fundamental reasoning, that is constituted, with an effective way, for a lower judge to depart indirectly from the binding precedent of a superior court.

The North American judge evaluates with a discretionary and mature way the relative jurisprudence and the operations, which also represent the different degrees of a general limit to the theory of stare decisis.

Undermining

It was Cross, who highlighted another technique, that weakens the judicial precedent, namely the undermining. Of course, one can speak of overruling since it is expressly or by implications to affirm, that the judge of the judicial precedent, according to the ratio decidenti, has judged in the wrong way and applied a ratio with opposite outcomes, which respect the right.

The ratio affirms the overruling and the analogous cases decided in the opposite way, that respect the superseded precedent. In civil matters the obstacles are also imagined in the criminal field. One thinks of the relative change in jurisprudence, that the conduct considered integral for the offence. In such a case, the

previous decision is considered criminally irrelevant, through the overruling of the previous decision.

The outcome in future cases is analogous and necessarily opposite to the relative respect of a superseded precedent, which today condemns the cases that bring possible new changes of direction.

A judicial precedent may be binding after a superior court ruling, that is not overruled. A lower court in 2020 finds a judicial precedent from the appellate court based on a 2014 supreme court precedent. The lower judge says that the appellate court precedent after a 2017 supreme court decision overrides and affirms the 2015 appellate court, which as noted misinterpreted the authorities.

The misinterpetation of the authorities is an argument that seeks to justify the decision, as a ratio of a supreme court council. The ratio is valid and also pending before the lower judge as are the arguments that justify the situation. Therefore, it is not obligated to follow the appellate court precedent that bound the supreme court, as happened with the 2017 hypothesis.

Another ratio is suitable as support for the ratio decidendi, that builds a starting point to a leading case. Specifically, the decisional outcome of the Court of Appeal of 2015 takes into account the different effect of overruling, which respects the undermining. Thus, the underming takes place without

overcoming the judicial precedent, i.e. the ratio.

An undermining by a lower judge does not lead to an outcome that has a decisional nature. It is opposite and respects the undermined decision.

In what cases is judicial precedent not followed?

The prohibition against following a previous decision has been contradicted by the provision of a statute and by a binding judicial precedent. The decision in conflict with judicial precedent cannot be considered precisely issued per incuriam only if it comes from a court, that is able to exercise the power of overruling the precedent, which is in conflict with the decision issued. For example, if the Court of Appeals of the New York has issued a decision, which is in conflict with a precedent of the same question, the intermediate state courts in the United States do not consider their decisions in a rigid and self-binding way.

This is implicit overruling and binding in a vertical sense towards lower judges in the same state for future similar cases, as a decision that is binding for the future. If otherwise issued per incuriam it does not bind the lower judges for future cases with the same court of appeal, which does not respect a relevant precedent of the supreme court of the same state.

It is also added the hypothesis, that the precedent does not appear to be operative to a legislative intervention, which disciplines and respects the judicial precedent, currently valid for the same case, as a form of repeal by ius superveniens. These cases faced with the limits of the doctrine of binding precedent. A decision per incuriam and a revoked precedent has a statute that is not a binding precedent. It exits the scope of operation of a rule stare decisis without any coercive effect.

Management, development and forms of judicial precedent

The constraint of judicial precedent persists in England and has abandoned America as a result of the use of overruling and of the ordinances of a series of working techniques, which in time develop a common law jurisprudential right, that constitutes and defines the precedent.

Elaborating judicial precedent means overcoming the classical theories of dissenting opinions, which express criticisms of legal positions. It is, therefore, constructed in an effective way the value of the precedent. Also it is limited to a decision of one or more judges, thus abandoning the jurisprudential lines.[36]

36See the dissenting opinion of the Associate Justice Harlan, in case Plessy v. Ferguson, 163 U.S. 537 (1896): https://supreme.justia.com/cases/federal/us/163/537/ (Accessed on 12.09.2025): "(...) the constitutional legitimacy of the segregated regulation of means of transport (of trains, in this case); by virtue of the separate but equal doctrine (...) of the constitutional legitimacy of racial segregation, provided that the services offered on scheduled trains were of equal quality (therefore without any differentiation for whites and blacks, but with the possibility of placing one and the other in different carriages) (...)". Judge Harlan in the same case affirms that: "(…) Constitution is blind, and neither knows nor tolerates classes among citizens (…)".

Both in the United States and in England the abstract rule of stare decisis evaluates the interpretative possibility of the precedent available to the judge. These are techniques, that are elaborated, from a jurisprudential point of view, with pathological aspects of the system and in essence with techniques, which manipulate the precedent constraint.

Shepard Citator describes the American system, in a precise way, as well as the different applications of techniques and decisions of jurisdictions, through a linear structure. The decisions of the courts, especially federal ones, are inserted in the reports.

The judicial precedent inserts the list of the subsequent decisions accompanied by a letter, indicating the way in which the judicial precedent was used in the citing decision as well as the location of a report, that is found. The relationships between the citing and the cited precedent lead to two different levels. The first level is related to the case history and concerns the form of a phase preceding the proceeding. The second level deals with the treatment and related cases, which the judicial precedent reserves and forms to a different case, a different proceeding.

The Shepard system shows the citation mode, through a series of abbreviations, such as the acronym: a) affirmed, in the degree of judgment, which is worth the precedent cited and modified the

We arrived in implied overruling in Plessy con Brown v. Board of Education of Topeka case, 349 U.S. 294 (1955): https://supreme.justia.com/cases/federal/us/349/294/ (Accessed on 12.09.2025).

content of the judicial precedent; c) connected case, that respects the precedent cited, which arises from a close connection with the precedent; d) dismissed, which denies the appeal to the precedent cited; e) explained, determines the scope of a precedent cited which thus adds and respects the content of the previous judge; h), harmonized, reconciles in an irrelevant manner the cited precedent, as well as other precedents; j) dissenting opinion, cites to a certain precedent the dissenting opinion of a determining judge, which is part of the opinion of the court; l) limited, clarifies a certain precedent, which interprets in a restrictive manner, thus limiting the scope of operation, which clarifies the precedent as a restrictive interpretation, thus limiting the scope of an operation, which appears to have been intended previously; q), questioned, applies the precedent and expresses in a doubtful manner its own validity, thus abstracting the rationale and its own content; s) superseded, replaces in the degree of appeal the justifying basis of the precedent, that is, it changes the ratio. Moreover, the acronyms f), d) and o), namely followed, distinguished and overruled are phenomena that together with c), namely criticized refuse to apply the precedent, which subjects the criticism to premises and conclusions.

Overall, the subject takes care of the attribution of certain acronyms based on the results expressed by the court and the

implied overruling, which records in a broad manner the operation, which testifies and indicates the number of pages that determine the use of the cited precedent.

Shepard also takes into account the reports, that have to do with the judicial precedent, giving rise to the list of citing decisions (Parallele Citations).

The opinions of the advocate general are also brought to a previous date through the Secondary Material and Annotations. These are operations used in England. They operate with the precedent at a practical level, which affects an explicit intervention, such as the aforementioned practice statement.

Even the overruling appears as the final result, which erodes the authority of a precedent, which repeats the techniques described for the immediate application of a regular intervention.

The panorama concludes the corpus based on case law to a common law system, which constitutes a number of elements, which live in their own singularity, thus presenting a series of lines of decisions as well as the single precedent to a piece of a mosaic, which takes into consideration a network from the precedents, which form a general outlined design.

The interpretation, application of the ratio decidendi reveals moments, which to a methodological process leads to the reconstruction of a rule of law, which is self-referential as an evaluation choice, which leads over time to more voices. The

importance of a precedent takes in consideration the authority, that is the precedential value. This follows, at a comparative level, the techniques of manipulation of the precedent, which describe and reveal its culture. It characterizes the common law systems in an essential way, thus constituting a constraint, which distinguishes in a reasonable way the tension towards the certainty of the law, which provides for the decisions.

The precedent as a culture followed, through jurisprudence forces, the judge seeking escamotages, to overcome the precedent that is not shareable. The common use of tools confers to the Anglo-American judges the decision-making powers, which are not dissimilar to their continental colleagues assuming a convergence between civil and common law systems to a formal, legal level as protection, which recognizes and evaluates the jurisprudential interpretation, which reflects the method of a decision generated with an operational way.

Flexibility of stare decisis in the North American system

Cultural factors as well as institutional ones in the United States influence and produce greater rigor to the stare decisis rule. This is an influence that has been going on since 1870 with Langdell (Langdell, 1991), Black and Wambaugh.[37] They represent an

37Cross, Harris affirms that: "(…) the analysis of a certain question is usually conducted in light (in addition to the rulings of the Federal Supreme Court) of the different jurisprudence of different states. In this way the aim is to find the best solution to a problem (…)".

interpretation of the precise elements of the jurisprudential panorama from its origin to the present day.

The overulling is in fact for the supreme court of the United States rigidly bound to its own precedents. The presence of a rigid and written constitution is placed in the hierarchy of normative sources, as provided for by Art. VI. It is a supreme law of the land with open and general clauses.

The jurisprudential law takes into consideration the time of the phenomena and the circumstances of a political-social nature, as a simple logic, which overcomes the unsuitable precedent of a constitutional amendment.[38]

The federal nature of a system of fifty different jurisdictions includes the two thirds of the two levels of judgment of a state supreme court of last resort, lacking the intermediate level of the federal judicial system, which takes into account the natural jurisprudence of a multifaceted nature for the supreme courts of each state, which are not binding on each other.

The federal courts of appeal and the state courts at an intermediate level to a constraint of self-precedent that is not part, in rigid terms and with a decisive manner, to the stare decisis but only at a vertical level and in terms of strict bindingness, comes from a federal supreme court in front of other state courts, federal that concern decisions of the state

38See the Associate Justice Louis Brandeis as a dissenting opinion in Burnet v. Colorado Oil and Gas Co. 285 U.S. 393 (1931): https://supreme.justia.com/cases/federal/us/285/393/ Accessed on 12.09.2025.

supreme courts against the lower judges, who belong to the same jurisdiction. It is thus attributed a treatment of the precedent, as the work of decisions citing in America, that provide for the possibility of overruling and the plurality of jurisdictions, that the referent assumes. It does not constitute single precedents in the form of lines and decisions to a set of jurisprudential orientations, which arise to a question.

The law reporting system, which dates back to the second half of the nineteenth century, makes available the precedents at a federal court level, which integrates the digitization of the related collections.

The rigid constraint, which overcomes the formalism initiated by Oliver W. Holmes (Holmes, 1923)[39] in the nineteenth century has opened the way to creative decisions of the judge, as a mediator of a value of continuity and uniformity, that does not take into account the consistency with the judicial precedents of the new social needs.

This is a legal realism, that was started by Benjamin N. Cardozo and K.L. Llewellyn (Llewellyn, 2009; Cardozo, 2012) and Jerome Frank (Frank, 1936), as an analysis of the legal process, that is, of a decision-making process, of a conduct that observes the judicial behaviour. Thus, the law is a means that responds to social needs, identifying choices of the subject, who judges the

39Holmes affirms that: "(…) the life of the law has not been logic; it has been experience (…)".

manipulative techniques of the precedent and perfects the solution of the case appropriate to a social and economic context.[40]

The above considerations take into precise consideration a flexible form of a precedent constraint in the United States, which gives rise to a true, general classical theory of precedent, that is, a theory of stare decisis, which also includes and approaches the notions of anticipatory and prospective overruling.

(Follows): Anticipatory overruling

The anticipatory overruling is an instrument, that vertically brings the rule of stare decisis to the possibility of a lower court, which operates the overruling of the precedent to a higher court. By subordinating the lower courts to the federal supreme court, the vertical constraint is respected, which operates with reference to a ratio decidendi and in relation to obiter dicta, thus finding the expectation for the supreme court to be able to change its address to a question that justifies the judicial precedent. Thus, the presence of an implicit overruling decides and takes the supreme court to a similar case in contrast with other precedents on the matter (Kniffin, 1982).

40Lord Asquith, in Journal of the Society of Public Teachers of Law, NS 1 (1950), p. 359 affirms that: "(…) rule is quite simple, if you agree with the other bloke you say it is part of the ratio; if you don't you say it is obiter dictum (…)".

The implied overruling is unequivocal. There is no talk of anticipatory overruling, when the lower court limits itself to the application of the law as unequivocally presented, thus avoiding following an outdated precedent. Thus, the anticipatory overruling anticipates the effects of an overruling by foreseeing in a precise way to speak to a less precise implied overruling.

The Supreme Court's prospective overruling considers the precedent of an obiter dicta, as a figure of an intention, that is oriented to a pronouncement, which defines in a precise and non-incriminating way the court, which carries out such work but also of the lower ones. It is a precedent value because of the division of the court as well as the presence of the members, namely one Chief Justice and eight Associate Justices. The prediction of a pronouncement not yet made implies in a contrary way the precedent.

We speak of anticipatory overruling in a manner consistent with the rules of the prospective overruling, that remains on paper and configures the intention for the future of a simple obiter dicta. It is an obiter, as a typology that pronounces in a non-binding manner. It is consistent with the idea of a ratio decidendi as a legal proposition, that resolves and respects the decisional rule that considers the obiter.

We arrive at an operational reality, that for the United States the constraint of the precedent comes from the federal supreme

court, that operates in a vertical manner and with regard to the obiter dicta.

The classical theory distances itself from the lower court in the perspective of an anticipated revocation by a precedent from the federal supreme court, which is configured as an anticipatory overruling.

The prospective overruling is equivalent to the obiter dictum. It means that it is not binding. The jurisprudence considers, that the prospective overruling does not contain the ratio decidendi, that produces binding legal rules for similar cases. Indirectly, it is overcomed as anticipatory overruling in the strict sense. The classical theory and the ratio decidendi consider the parties, that motivate the sentence as binding for future cases.

The use of the technique concerns the hypothesis, that in a direct and proportional way considers the level of the questions, that know the personal opinions of the judges, that respect some hot topics. In such a way, such a technique foresees frequent decisions to an appeal of an anticipatory overruling, as a phenomenon of stare decisis, that is not based on previous decisions but on future ones.

The power of anticipatory overruling is exercised in England in exceptional cases.[41] Thus, an attitude is recorded for English judges, who resist over time and push for the rigidity of the rule

41 Young v. Bristol Aeroplane Co. op. cit., and the opinion of Lord Denning in case Cassel & Co. Ltd. v. Broome [1972] A.C. 1027, 1085, H.L.

of stare decisis in partem and in the declarative theory, that respects the idea of judge made law. The vertical constraint recognizes the power, which revokes the precedent with a limited way for its own future (Atiyah, Summers, 1987). In this case, it is a question of prospective overruling.

(Follows). Prospective overruling

The prospective overruling as a technique of an exercise of the power of overruling for future cases decides the application of an outdated precedent. These are effects that follow the change in jurisprudence over time. It is limited to cases outside of the pending case. This technique is in contrast with classical theories of stare decisis and is not applied in England (Traynor, 1977).

The declarative conception of law in the English system influences the resistance of the use of prospective overruling, as a positive culture to a rigid separation of powers, which reaffirms and regulates future cases for the legislative power, for the courts that render judgment on past facts.

In the classical theory, the divergences are substantiated by an open incompatibility, according to which the judge decides the case and is not the creator of a right. In other words, it limits itself to declaring that the pre-existing right is the basis of a discovery for a right, that detects as existing all the right. This

means that the law is not unique and is not conceivable to a certain law that is applied to resolve and affirm the law for the cases that come.

Instead, in the United States it naturally puts into practice the attendance for the Supreme Court, which updates addresses that protect the legitimate trust (reliance) of the individual relating to a precedent, which finds its basis in the last decade of the nineteenth century (Tedeschi, 1973).[42]

The equity system as a procedural model affirms the dominant. The data is interesting for the historical genesis of a technique of the prospective overruling, as origin under the impulse of the canonists of the XVII century.

The situation derives from the circumstance, that the prospective overruling arrives at future decisions, which are founded on an adequate regula iuris with the perception of interested parties, who are judged to a wrong norm. This is how wrong rules are destined.

An interesting balance for stare decisis is made with an overruling, which prefers a prospective overruling proposed to the American courts, that face questions of a problematic nature. This is a margin of maneuver that goes overseas and attributes the opinion of the federal supreme court made by the associate judge Cardozo in the Great Northern Ry Co. v. Sunburst Oil & Reflining Co. case. In this case, the exercise of prospective

42 Jones v. Woodstock Iran Co., 10 50 635 (1891).

overruling as a violation of due process clause, i.e. the V and XIV amendment of the constitution, recognizes the relative power to the courts of each state and also defines the limit of adherence to the previous, thus determining the application of a retroactive nature to a new legal rule.

The common lawyer's mindset does not surprise the discourse of the question of juristic philosophy of a single judge of a conception that gives rise to the nature of law.[43]

The technique of a temporal effectiveness of the judicial precedent, as a prospective overruling of atypical nature, consists of a future operation of a jurisprudential nature in relation to current cases pending before the judges, who exercise them.

The typical effects are limited to a prospective overruling for the single case, which operates the turning point and ends with the direct application of a new regula iuris to a full overruling of retroactive nature.

From this technique arises the need for an inconvenience for the parties, who convince the court and who try to innovate matters that are aware to the judge, who modifies a certain legal rule in abstract without a precise legal sphere.

43 Great Northern Ry Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). https://supreme.justia.com/cases/federal/us/287/358/ Accessed on 12.09.2025.

Overruling in the criminal sector

The common law crimes are part of the jurisprudential genesis. The statutory crimes are provided for by law. The common law crimes are few and the prohibition of the ex post facto law in the criminal sector leads to the systems, which measures the United States and England leaving out the cases of a criminal nature elaborated in forum.

The constitutional principle of non-retroactivity of a criminal law that has been provided for by the United States in Art. I, sec. 9, i.e. in the federal sphere and sec 10, i.e. the state sphere, ends up implicitly constitutionalizing the nullum crime sine lege.

In particular, in England the precise jurisprudential orientation is limited to the statutes and to a future, that has indirectly matured the perception of the common law crimes, which thus represent an ex post facto law, that is not tolerable. The orientation of a declarative theory of the common law establishes a precedent, which qualifies as criminal the conduct, that cannot from a theoretical point of view create a problem of retroactivity if it is a leading case and an overruling.

The phenomenon that explains the Blackstone conception of law has a declaratory nature. The interpretation of the criminal law is essential for the judge, who guarantees the accused. In England the restrictive interpretation of precedents in the criminal sector mostly follows the classic common law, which defines in

various ways the bond, that derives from the feudal pact by providing for the death penalty.

The tendency punishes facts considered serious, deserving the death penalty. In the interpretation of the penal statutes, Sir Edward Coke (17th century) already affirmed in favor of the accused the strict construction of penal statutes and in a rigorous manner the legislative provisions with the death of crimes, which are of small punishment. Such rules of an overseas hermeneutic nature convert the prohibition of analogy into malam partem,[44] as a recourse to an extensive interpretation.

The precedents relating to the Anglo-American common law in the criminal sector are connected with the interpretation of the statutes. They are bindingly linked to the ruling of the superior court, that concerns a criminal offence provided for by law. The problem of retroactivity does not derive from the promulgation of the relative criminal law.

As an eventuality it is connected to a jurisprudential interpretation of a criminal offence with an unfavourable outcome for the position of the accused. We think of the decision that proceeds to the overruling of the acquittal precedent. In this case, the accused commits a retroactive application of an incriminating provision.

The moment that considers the jurisprudential turn in pejus to be

44Bouie v. City of Columbia, 378 US 347 (1964): https://supreme.justia.com/cases/federal/us/378/347/ Accessed on 12.09.2025.

criminally unlawful is considered criminally lawful, that is, the moment when the accused ends up being convicted. Attention to North American systems is oriented to situations, that must not operate retroactivity and determine the limits of the prospective limitation of the effects of the sentence.

The techniques of such a result attribute to the defect of a subjective element, which is worth as mistake of law, thus continuing to apply the precedent in a way favorable to a prospective overruling.

The mistake of law recognizes guilt, which with the inevitable way of the ignorantia legis and as a consequence of the error iuris, protects the legitimate trust of the accused on previous acquittals, which concern the same fact coming from superior courts, such as for example the appellate courts.

The mistake of law detects a serious uncertainty of the duties of information on a criminal precept, which resolves the ignorantia legis. The fulfillment of the duties of information has led the agent to a criminal lawfulness of a conduct, which places the cause of erroneous indications on the interpretation and execution of a criminal law. The failure to publish a criminal law thus generates a situation in re ipsa unknown.

In the penal system, which inevitably represents the legislative provision and the judicial interpretation, the Supreme Court allows to arrive at and affirm a judicial interpretation of a

statute, which, thus, becomes part of it and as it is stated:

"(…) the interpretation is subsequently modified (…) it is subject to the same limitations as legislative changes (…) such a conduct is defined as innocent at the time of its commission, cannot (in the absence of adequate guarantees) be declared criminal later, given the constitutional prohibition of ex post facto laws (…) it also applies to changes in judicial precedents (…)".[45]

The principle of non-retroactivity in the criminal sector constitutes a foundation of the institute under examination. The lack of a subjective element, apparently in an operational dimension of the law in action, reveals the judgment. Also, it does not proceed to the ascertainment of a psychological attitude of an acting subject on the occasion of the commission of the act, as effectively entrusted to a previous acquittal, that determines the possible relevance of a criminal nature and of one's own conduct.

The relevance of an error iuris is ascertained in a previous acquittal at the time of the commission of the crime, which presumes the overruling in pejus, that exercises and does not prejudice those who have entrusted the previous acquittal, thus valorizing the potential justifiable mistake of law (Pomorski, 1975).[46] Thus a factual situation is determined, which coincides with the promulgation of a criminal law, which operates retroactively to the criminalization of a conduct, which is considered irrelevant from a criminal point of view.

45 Chief Justice Deemer in State v. O'Neil, 147 Iowa 513, 126 NW 454 (1910): https://case-law.vlex.com/vid/state-v-neil-907056027 Accessed on 12.09.2025.

46 Chief Justice Warren in James v. U.S. 366, US 213 (1961): https://supreme.justia.com/cases/federal/us/366/213/ Accessed on 12.09.2025.

A prospective limitation in the effects of the judgment is the result, which derives from a recognition of a mistake of law. This leads to the retroactivity of unfavorable legal effects, such as the jurisprudence of the supreme court of 1913, without affirming the constitutional basis of a prospective limitation, which is considered necessary for the respect of instances in guarantee of the prohibition of ex post facto law in criminal matters, according to art. I, sec 9 and sec 10 of the constitution. This is a principle contrary to the prohibition, which thus addresses the lex scripta as well as the judicial decision to the legislator and not to the judge.[47]

This passage includes the preference of the technique of the mistake of law, which respects the prospective overruling. As a private instrument, in the North American system, it has been used in the criminal field. It is openly admitted that the role of jurisprudence in criminalibus is prevalent to influences resistant and contrary to the form of judicial innovation of law.[48]

The choice in favor of the mistake of law allows the limitation of the effects, which are unfavorable to the only formal safeguard of the retroactivity of overruling, thus avoiding the

47 Ross v. Oregon, 227 US 150 (1913): https://supreme.justia.com/cases/federal/us/227/150/ Accessed on 12.09.2025.

48 Rogers v. Tennessee, 532 U.S. 451 (2001): "(…) a very disenchanted vision of the exercise of jurisdictional power; from the point of view of our continental dimension (…) prospective overruling dictates a decisional rule only jure constitutionis (while jure litigatoris opts for a different solution), similar to an arrêt de règlement: something similar to a law (…)".

rigorous Blackstonian positions.

In the few cases of the prospective overruling in the criminal field the prospective limitation implements the prohibition of retroactivity of the criminal law contra reum to the principle of just punishment[49] and to the prohibition, which inflicts cruel punishments according to the eighth amendment[50] as well as to the plainest principles of justice.[51]

Judicial precedent and effectiveness of the system

The functioning of stare decisis identifies the institutional condition of operation type, which satisfies the functioning of the system of judicial precedent. The effectiveness of the rule of stare decisis does not disregard the hierarchy of the courts at a single vertex, which directs the jurisprudence.

The organization of the pyramid of a condicio sine qua as a constraint of the precedent, in a vertical sense, works according to the pronouncements of the supreme court.

The reasoning and presence of the jurisdictional body calls and guides the lower judges in the interpretation and application of judicial precedents, which are elaborated in the forum as case

49 North Carolina v. Bell, 136 NC 647, 49 SE 163 (1904): https://casetext.com/case/s-v-bell Accessed on 12.09.2025.

50 State v. Longino, 109 Miss. 125, 67 So. 902 (1915): https://www.courtlistener.com/opinion/8035828/state-v-longino/ Accessed on 12.09.2025.

51 State v. Jones, 44 N. Mexico 623 (1940): https://casetext.com/case/state-v-jones-2291 Accessed on 12.09.2025.

law and concern the application and interpretation of provisions of law, i.e. statutes which in the United States are constitutional norms.

The binding judicial precedent of the Anglo-American legal systems pursues the value of legal certainty. The tension and direction do not constitute exclusively the contact with the common law. This conception created by the ideal of legal certainty in continental Europe and materialized above all the phenomenon of a codification, which looks at the value of certainty in double thread together with the declarative theory. Objective law is a task, that follows for the judge, a law understood as a fixed and immutable corpus except erroneous and absurd decisions, that are overruled declaring what the law was.

Certainty is on a par with uniformity. The interpretation and uniform application of the relevant legal rules have to do with the certainty and predictability of decisions, which respect the effectiveness of the system. The precedents and the courts are inferior and obliged to follow the legality especially in the appeal level, that modifies, revokes the precedent to the lower court, as a ratio not valid to regulate future cases, or to overcome a judicial precedent.

The dictum of the supreme court arises within certain limits the factor of the jurisdictional activity of the other courts. Thus, it is

understood that the distinguishing and the overruling as well as the recourse to the anticipatory overruling are consistent with the fact that the techniques analyze the limits of the theory of stare decisis.

In author's opinion, the Supreme Court limits the jurisprudence to the minimum space, as coexistence of different regulae iuris, as interpretations of a constitutional provision, applicable by different judges at a historical moment but not in disharmony in time.

The Supreme Court exercises the power of overruling decisions, which they deem appropriate the direction of a certain question. The prerequisites for the Supreme Court, as custodian of the case law of binding precedents, in an effective way, operate and fulfill its institutional task. Thus, two lines of orientation are considered, which are valid as components of a number of judges, who are relatively small and able to exercise a discretionary power in the selection of cases to be heard.

The Supreme Court should be unique and does not insist on the organization of a plurality of jurisdictions, which are subordinate to supreme courts and at the same level independent of each other within the perimeter of the attributions of the institution of an ad hoc body for the control of a constitutional legitimacy for the laws and those having the force of law. The genesis and the jurisprudential directions lead back to a factual

force proven to a supreme court.

And it is precisely the civil law in England as an administrative sector that has not a real form of control of constitutionality of the laws. Such an order has to do with the review of constitutional legitimacy as stated by the chief justice Marshall in the Marbury v. Madison case of 1803[52] of the federal supreme court. Thus. the precedent is explained as an effective unification.

The members of the organ for the English and American supreme courts are divided into a plurality of sections, that are composed of twelve and nine judges (MacCormick, Summers, 2016) respectively,[53] a rigorous composition with the possibility of interpretative divergences, that favor the value of the precedent in the decisions. The members increase the risk and the divergent opinions. A percentage of unanimity of the relative decisions of the authority are formed previously from the pronouncement.

52Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) https://supreme.justia.com/cases/federal/us/5/137/ Accessed on 12.09.2025.

53MacCormick, Summers affirmed that: "(…) the English Supreme Court as atypical (with respect to the functioning of supreme courts in general, even civil law courts) since it is formally a single body, but in practice it works through unofficial and informal panels (...) reduced number of members, it does not seem that this fact can call into question the conclusions that will be reached in the continuation of the discussion (…)". It is a compact, manageable, unitary structure typical of common law supreme courts. The Constitutional Reform Act of 2005, Part 3, sec. 23(3) and 24(4) provides that, "while the current composition of twelve remains unchanged, the Crown reserves the right to increase the number, subject to the approval of Parliament (...)".

The notion of dissimilarity and uniformity in time and space records a rigorous composition of a vertex, which influences incisively the temporal stability to a precedent. This is a functional model, which ensures a certain temporal uniformity towards a coherence of judging members, who respect their own orientations.

In the legal systems of the United States and England, the vertical body is based on the possibility of guaranteeing a functioning instance, which operates to a control of legitimacy and to a contested decision.

The model of the Supreme Court provides selective mechanisms for appeals and criteria, which are connected to questions, that arise from the possibility of significant precedents and to the solution of a single and precise case.

The discretionary power is consistent with top-level functions and the court focuses on questions, which require its own directive intervention with a unification perspective. Thus, the prospective orientation looks to the future, to similar cases as well as to the objectives of a jurisprudence, which the courts will have to judge.

The guarantee of the functioning to an unchallengeability of the exercise of the discretionary power is motivated in reasoning of the type: “discretion without any justification is the basic rule for such courts”. The appeal subordinates the permission of the

judge, who issued the relative sentence thanks to the system of pronunciation conditions. The number demands particular cases, that is, on controversial and different issues (Campbell, 2018).[54]

The Supreme Court of the United States similarly provides a relative rigorous filter, which exercises the instrument of the writ of certiorari, thus representing a discretionary power in cases to decide with an absolute manner. It occurs in parallel with the judge and in cases that proceed a constitutional interpretation, that intervenes in an incisive manner, within the scope of the protection of individual rights.[55]

The criteria of the selective filter evaluate the opportunity, which establishes the new precedent, the overruling of a precedent and of a lower court, as well as to resolve a conflict between precedents. Choosing a case based on the relevance of the issue, leads to the opportunity to establish a precedent, that is, the decision selected and relevant to the normality of the previous hypothesis.

54R (Miller and another) v. Secretary of State for Exiting the European Union [2017] UKSC 5: https://www.supremecourt.uk/cases/uksc-2016-0196 (Accessed on 12.09.2025): "(...) declared competent to adjudicate on conflicts of attribution between state powers (…) an action to regulate the borders (...) between the legislative, executive and judicial branches (…). In the British Constitution, the scope of the principle of sovereignty, of the rule of law, as well as of royal prerogative powers (...) it seems evident that such a pronouncement suggests a role [of the Supreme Court] that is properly "constitutional" and that seems destined to expand in the near future (...) the Court was asked to clarify what legislative procedure, that should be adopted on the occasion of Brexit: this was considered to be an even broader power than that which the US Federal Supreme Court attributed to itself on the occasion of the aforementioned Marbury v. Madison case of 1803 (...)".

55Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

The relationship between law reporting and discretionary power significantly decides the operation of appeals, that are received by the top during the year with effects on decisions, that are unknown, unpublished, summarily published and thus ultimately result as “forgotten even by the court itself” (Bellet, Tunc, 1978).

Operational law reports and adequate final conditions

The stare decisis system depends on a law reporting system, that is not totally comprehensive because it risks having unwanted, incomprehensible and inefficient effects. Thus, a precedent is recorded in an in action dimension between published and unpublished precedent. The ratio decidendi, as a binding authority, in an operational reality, seems to be a knowable factor of the precedent, as a conditio sine qua non, that enters into a logical-argumentative reasoning of a judicial nature. The collection, indexing, publication of sentences in a legal heritage produces an evolution for the case law destined to lose its natural consequences (Warren, 1908).

The discipline in North America was extended but also to all other states, requiring judges and superior courts to bring decisions in writing. Thus, the reference to the fact of the principle of a right expressed in their decision clarified the central fact included in sentences that were properly reported

within the perspective of a road of the "permanent system of common law".[56]

In England the jurisprudential collections (Maitland, 1904; Plucknett, 1956) made the precedents as "a convenient form",[57] within the synthetic need for a good dose of accuracy (Lewis, 2021).

As a selective model that included law reports in all cases, that were the subject of a decision considering as relevant the semi-official body examined, through the Incorporated Council of Law Reporting. This judgment was fundamental for the pronouncements of a previous vocation, which verified a regula iuris, that modified the solution of a doubtful question.[58]

Many times the incorporated council highlighted the English reports, which respected the North American ones. The reports thus include seventy percent of the sentences from the supreme court and twenty-five percent from the court of appeal. Only ten percent from the high court.

The testimony from the origins in England and the official reporters depended on the state and the members from each Inns of Court and from the General Council of the Bar, which was part of the state administration. The selective repertoires capture

56 Revised Statutes of Connecticut of 1784, p. 207: https://libguides.ctstatelibrary.org/law/statutes/1650-1958 Accessed on 12.09.2025.

57 https://web.archive.org/web/20100116090616/http://www.lawreports.co.uk/AboutICLR/history.htm Accessed on 12.09.2025.

58 https://web.archive.org/web/20100116090616/http://www.lawreports.co.uk/AboutICLR/history.htm. Accessed on 12.09.2025.

the relationship of the decisions of the English courts, which are inferior to the High Court, in a binding way, for the courts of the same level.

The majority of the cases have no persuasive value and publish the minimum of the parts, that are difficult to find. The rule of stare decisis is effective and provides for general reports for the value of the precedent of a decision, that is closely related to its verbalization.

In the United States, the publication and collection of decisions reflect the articulation of the courts, the territorial locations and the relative relationships. From the fifty jurisdictions, which were independent, each of which provided for an order of courts to a federal justice system with jurisdiction in matters. These are indicated by the constitution as the district courts and the courts of appeal to arrive at the supreme court.

The production centers of a jurisprudential nature call in a unitary way the national reporter system in the nineteenth century, which divides a territory for the United States into seven districts also providing for its own collection.

The American system since the nineteenth century, unlike the English one, entrusted its task of editing decisions to an official reporter, who depended on the state. The revolutions to a previous system in the United States was based on a registered system, namely the Chief Justice Marshall and the official

reporters (Surrency, 1981).

The reports with commercial success took care of the publications and limited the reports to a daily practice,[59] which intuited a volume of published decisions, which reached a number of five million (Jacobstein, Mersky, Dunn, 2001). The state of New York was the jurisprudential leader, which respected a series of reports from the Supreme Court. Decisions from lower courts were not published except for rare exceptions such as for example when:

"(…) do not serve as mandatory precedents and they do not play an important role in legal research (…)".

The selection of decisions and organic collections, the American precedents especially in England required the indexing system for acts, which guaranteed a consultation of the jurisprudential data[60] and that is why the digest tool was born.[61]

The American Digest System is a system of court decisions, that are published in reports in chronological order in a rigorous concept, thus highlighting the functioning of an integral system of sentences, as a unit that the headnotes are prepared by the same judge. It is a summary sheet of the law that decides and consists of the result of a procedure, which extracts the principle

59For the supreme federal court the United States Reports (U.S.). the United States Supreme Court Reports, Lawyers' Edition (L. Ed., L. Ed. 2d), which is published by Lawyers Co-operative Publishing Company.

60See the English and Empire Digest (III ed., from 1971).

61Digest of Courts of Common Law and Admiralty and from 1848 the United States Digest of Decisions, Courts of Common Law, Equity and Admiralty with 31 volumes. We have 14 volumes from Benjamin Vanghan Abbott and the Century Digest with 50 volumes.

of law, that emerges with an explicit and implicit way to a decision, which is published in the national reporter system. So the digest is presented as a list of headnotes that are in a group of subjects and arranged in alphabetical order. The previous one requires the high reliability of a system with continuous updating.[62]

The headnotes, through the attribution of key number towards a code, which corresponds to a single point of law and in the respective headnotes, allows the decisions to be divided into seven legal areas each in eight categories and according to a certain number. The decision published by a national reporter system accesses precedents, that concern the point of law that comes from attributed codes and at the same time respects new unclassified issues.

Finally, the digitization system to a repertory allows direct access via the Westlaw platform and the full text of a decision, which the headnotes try to analyze the rationale decidenti. The facts avoid the weaknesses to a voluntary system for cases, that respect a repertory, that is characterized by an extensive publication.

62 See the Decennial Digest in 25 volumes.

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